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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 3**
**NASSAU COUNTY**

**In the Matter of the Application of**
**LEO LIEBOWITZ, ROSE LIEBOWITZ,**
**MORTIMER SLOAN and JUDY SLOAN,**

**Plaintiffs,**

**For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,**

**-against-**

**MOTION SEQ. NO.: 001, 002**
**MOTION DATE: 3/7/12**

**THE BOARD OF TRUSTEES OF THE INCORPORATED VILLAGE OF SANDS POINT THE VILLAGE CLERK OF THE INCORPORATED VILLAGE OF SANDS POINT and THE INCORPORATED VILLAGE OF SANDS POINT.**

**INDEX NO.: 8698/11**

**Defendants.**

**The following papers having been read on the motion (numbered 1-7):**

**Order to Show Cause Motion Seq. No. 001.....1**
**Notice of Motion Seq. No. 002.....2**
**Affirmation in Opposition.....3**
**Reply Affirmation.....4**
**Supplemental Affirmation in Opposition.....5**
**Supplemental Reply Affirmation.....6**
**Memorandum of Law.....7**

Application pursuant to CPLR Article 78 by the plaintiffs/petitioners Leo Liebowitz, Rose Liebowitz, Mortimer Sloan and Judy Sloan (collectively petitioners) to, *inter alia*, annul Local Law 3[1] of 2011 is **denied** and the petition is hereby **dismissed**.

[1]In view of the fact that Local Law 2 was amended by Local Law 3, any challenge posed with respect to constitutionality/procedural irregularities *vis-a-vis* Local Law 2 as originally enacted is academic. There is presently a justiciable controversy, therefore, only as to Local

Motion by respondents Board of Trustees of the Incorporated Village of Sands Point, the Village Clerk of the Incorporated Village of Sands Point and the Incorporated Village of Sands Point (collectively the respondents) to dismiss the amended complaint/petition pursuant to CPLR 3211(a)(3), (a)(7) and CPLR 7804(f) is **granted** and its is hereby declared that Local Law 3 is not impermissibly vague.

Petitioners, the owners of property located directly adjacent to private residential property[2] which was used to film a television show entitled "Royal Pains," claim that their properties were severely impacted by the respondents' issuance by the Village Clerk of movie filming permits to the neighboring homeowner pursuant to Local Law 3. They allege that movie operations, staging of equipment and the placement of sanitary facilities directly in front of their respective homes during the filming of the show encumbered the use and enjoyment of their property.

In this hybrid proceeding, petitioners challenge respondents' adoption of Local Law 3 entitled "Movies and Filming in the Incorporated Village of Sands Point Law," which amended Local Law 2 of 2011, an earlier filming regulation[3] ordinance, based on the theory that, in adopting Local Law 3 of 2011, respondents failed to comply with both the procedural and substantive requirements of the New York State Environmental Quality Review Act (SEQRA) and the referral requirements of General Municipal Law § 239-m. They further allege that the law conflicts with existing provisions of the Village of Sands Point Zoning Code and is unconstitutionally vague. They specifically allege that, pursuant to the Village of Sands Point Code, there are only three permitted zoning classifications for properties located within the Village: Residence "A" Districts; Residence "B" Districts and Residence "C" Districts and the Village Code does not

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Law 3 of 2011.

[2]Mr. & Mrs. Liebowitz and Mr. & Mrs. Sloan are the owners respectively of 7 and 8 Vanderbilt Drive, Sands Point. A filming permit was issued to their neighbor, Peter Forman, on May 3, 2011 to allow filming at his home located at 10 Vanderbilt Drive on May 5, 2011 and May 6, 2011 from 7:00 AM to 9:00 PM and on May 12, 2011 and May 19, 2011 from 8:00 AM to 11:00 PM. According to petitioners, the permit issued violated Local Law 3's restrictions with respect to the number of days of filming allowed as well as the duration of the filming day.

[3]According to respondents, a public hearing was held on February 15, 2011 regarding Local Law 3 (which changed discreet portions of Local Law 2) for comment by the public and discussion by the Board of Trustees.

permit commercial or business uses within any of the Districts except for a club use. They, therefore, request a preliminary injunction to enjoin respondents from issuing any further filming permits in order to preserve the status quo pending full adjudication of the merits.

Notwithstanding the fact that the contested filming occurred in May, 2011, and petitioners accepted location gratuities to compensate for anticipated inconvenience caused by the filming, they now seek to challenge Local Law 3 which sets forth the guidelines for filming within the Village of Sands Point.

Respondents argue that the challenge is untenable on the grounds that: (1) petitioners lack standing to pursue their claims; (2) the enactment of Local Law 3 was a Type II Action not subject to SEQRA review as it concerns minor temporary use of land having negligible or no permanent impact on the environment (*see*, 6 NYCRR 617.5[c][15]) and the adoption of regulations, policies, procedures and local legislative decisions in connection with a listed action (*see*, 6 NYCRR § 617.5[c][27]); (3) Local Law 3 was not required to be referred to the Nassau County Planning Commission under General Municipal Law § 239-m because it is not a zoning ordinance but, rather, a local law regulating filming – a First Amendment protected activity – in the Village; and (4) Local Law 3 is not unconstitutionally vague.

Respondents further contend that because petitioners have not suffered a direct injury from the enactment of Local Law 3, which differs from that suffered by the public at large – nor alleged that the public at large suffered any injury at all, they lack standing to challenge either the enactment or constitutionality of the law.

On a motion to dismiss pursuant to CPLR 3211(a)(7) and CPLR 7804(f) such as that before the court, the petition/complaint alone must be considered and all of its allegations are deemed true and must be afforded the benefit of every favorable inference. *Matter of Miller v Milligan*, 73 AD3d 781, 783 [2nd Dept 2010]; *Matter of Bloodgood v Town of Huntington*, 58 AD3d 619, 621 [2nd Dept 2009].

In reviewing a determination made pursuant to SEQRA, it is not the role of the court to weight the desirability of the proposed action, choose among alternatives, resolve disputes among experts or substitute its judgment for that of the agency. *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986].

Whether in the form of an Article 78 proceeding for review of an administrative determination, or an action for an injunction, challenges to zoning determinations may

only be made by aggrieved persons. Aggrievement warranting judicial review generally requires a threshold showing that a person has been adversely affected by the respondents' activities, i.e., that he has sustained special damage, different in kind and degree from that suffered by the community generally. *Matter of Sun-Brite Car Wash, Inc.v Board of Zoning and Appeals of the Town of North Hempstead*, 69 NY2d 406, 412 [1987], *reargument denied* 70 NY2 694 [1987]. Whether a party has standing to seek judicial review of a particular claim or controversy is a threshold matter, which, once challenged, should ordinarily be resolved by the courts before the merits are reached. *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991].

Standing to challenge an administrative action is generally based on a showing that the action will have a harmful effect on the challenger and that the interest to be asserted is within the zone of interest to be protected by the statute. *Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996]. Standing to bring a CPLR Article 78 proceeding requires the existence of an injury in fact – direct harm/injury that is in some way distinct from that of the general public.[4] *Matter of Harris v Town Bd. of Town of Riverhead,* 73 AD3d 922, 924 [2nd Dept 2010], *lv to appeal denied* 15 NY3d 709 [2010].

Ownership of property adjacent to, or very close to, affected property may generally give rise to a presumption of standing involving zoning changes because it is reasonable to assume that an owner located in the immediate vicinity of a rezoned area will suffer an injury different from that of the community at large. *Matter of Sun-Brite Car Wash, Inc. v Board of Zoning and Appeals of the Town of North Hempstead, supra* at p. 413. Here, the challenged action does not constitute a change in the zoning law, and petitioners' interests are not in any way different from those of the public at large. Nor have they shown any manner in which the Local Law 3 will have a far reaching/dramatic effect on, or alter, the character of the Village of Sands Point. It is not enough that the issue may be one of wide public concern. Here, petitioners have not shown that they have suffered actual injury different from any injury suffered by the community at large. *Shapiro v Town of Ramapo*, 29 Misc 3d 1220(A) [N.Y.Sup. 2010].

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[4]Criteria regarding standing in a proceeding pursuant to Article 78 to challenge a land-use approval are the same as those that govern an action for a judgment declaring that a zoning ordinance is invalid. *Matter of Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d 931, 934 [2nd Dept 2010], *lv to appeal denied* 15 NY3d 709 [2010]..

The State Environmental Quality Review Act (SEQRA) requires that social, economic and environmental factors be considered in reaching decisions on proposed activities. Environmental Conservation Law § 8-0103[7]. SEQRA insures that agency decision makers, enlightened by public comment where appropriate, will identify and focus attention on any environmental impact of a proposed action. *Matter of Jackson v New York State Urban Dev. Corp.*, *supra* at p. 414-415. The New York Codes, Rules and Regulations (NYCRR) provides enforcement procedures with respect to the Environmental Conservation Law. Pursuant to the regulations, actions undertaken by an agency that have a significant impact on the environment require an environmental impact statement. Actions under SEQRA are divided into two categories: Type I and Type II actions. Type II actions are not subject to review and have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review. 6 NYCRR § 617.2(a). Actions include any "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that: (i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency or agencies; . . ." 6 NYCRR § 617.2(b)(i-iii).

A challenger asserting that SEQRA has been violated must demonstrate that he will suffer an injury that is environmental and not solely economic in nature. *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY 428, 433 [1990]. A SEQRA challenger must also demonstrate that it will suffer an injury that is different in kind or degree from that suffered by the public at large. Generalized environmental concerns will not suffice and when no zoning related issue is involved, there is no presumption to raise a SEQRA challenge based on a party's close proximity alone. The burden of establishing standing to challenge an administrative action lies with the party seeking review. *Society of Plastics Indus. v County of Suffolk*, *supra* at p. 769.

Pursuant to General Municipal Law § 239-m(3)(a)(ii) and (3)(b), the adoption or amendment of a zoning ordinance or local law affecting real property within 500 feet from the boundary of any city, village, town, or existing or proposed county, state park or road must be referred to the County Planning Board for review.

Local Law 3 is not an amendment to the Village of Sands Point Zoning Ordinance Rather, it regulates filming, an ongoing, previously unregulated activity permitted by Local Law 2. As such, the referral requirement of General Municipal Law § 239-m was

not triggered.

As stated by the Court of Appeals in *Hold v Tioga County*, 56 NY2d 414 [1982], "[w]hen a locality exercises the legislature power delegated to it by the State Constitution, there is an 'exceedingly strong presumption' that the local law enacted is constitutional. (*Lighthouse Shores v Town of Islip,* 41 NY2d 7, 11, 390 N.Y.S.2d 8227, 359 N.E. 337)." The exceedingly strong presumption of constitutionality applies not only to legislative enactments but to municipal ordinances as well. *Festa v New York City Dept. of Consumer Affairs*, 12 Misc 3d 466, 475 [N.Y.Sup. 2006]. In order to defeat the presumption of validity, a party must show that the local law in question is inconsistent with either the State Constitution or a general law. *41 Kew Gardens Rd. Assoc. v Tyburski*, 70 NY2d 325, 333 [1987].

Petitioner has failed to show any manner in which the regulations set forth in Local Law 3 are constitutionally vague. Petitioners have failed to rebut the strong presumption of the constitutional validity of Local Law 3 by demonstrating its unconstitutionality beyond a reasonable doubt. *Rochester Gas & Elec. Corp. v Public Serv. Comm. of State of N.Y.*, 71 NY2d 313, 320 [1998]. The regulations set forth in Local Law 3 afford a reasonable degree of certainty to a person of ordinary intelligence so that he or she is not forced to guess at their meaning, and they are sufficiently clear so as to safeguard against arbitrary enforcement. *Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256 [2010], *cert. denied* by *Tuck-It-Away, Inc. v New York State Urban Development Corp.*, __ U.S. __ 131 S.Ct. 822, 178 L.Ed.2d 556.

This constitutes the Order of the Court.

Dated: May 7, 2012

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE